(3)

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

No. 03-1267

IN THE

Supreme Court of the United States

GABE KAIMOWITZ,

Petitioner,

v.

ORLANDO, FL; RICK BERNHARDT, and ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

H. Gabriel Kaimowitz
Attorney and Petitioner Pro Se
4411 S.W. 34th St., #1305
Gainesville, FL 32608
(352) 375-2670

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....i

INTRODUCTION.....1

ADDITIONAL STATUTE INVOLVED.....6

I. THIS COURT HAS JURISDICTION.....6

II. THIS PETITION REQUIRES SCRUTINY MANDATED IN *LILJEBERG. v HEALTH SERVICES ACQUISITION CORPORATION*.....7

III. SUITABLE COUNSEL CAN BE FOUND TO ARGUE THESE IMPORTANT ISSUES.....10

CONCLUSION.....10

TABLE OF AUTHORITIES

CASES CITED:

Clark v. Florida,
475 U.S. 1134 (1986).....8

Elk Grove Unified Sch. Dist. v. Newdow,
#02-1642 (2003).....10

Haitian Refugee Center, Inc., v. Baker,
501 U.S. 1122 (1992).....8

Kleem v. Immigration and Naturalization Services,
497 U.S. 1308 (1986).....6

Page

Koch v. Herron,
453 U.S. 946 (1981).....2

Liljeberg v. Health Services Acquisition Corp.,
846 U.S. 847 (1988).....7,9

Missouri v. Jenkins,
497 U.S. 33 (1990).....6

Toledo Scale Company v. Computing Scale Company,
261 U.S. 399 (19230.....8

STATUTES AND RULES CITED

28 U.S.C. §2101(c).....6

S. Ct. R. 10.....8

Rule 41(a), F. R. App. P.....6

OTHER AUTHORITY CITED

The Orlando Sentinel, including items below:
http://www.orlandosentinel.com.....3

B. Kassab, "Old loans close in on landlords,"
The Orlando Sentinel, Apr. 6, 2004.....4

Editorial, "A contract is a contract,"
The Orlando Sentinel, Apr. 12, 2004.....4

H. P. Curtis, "Officials launch new courthouse,"
The Orlando Sentinel, Apr. 6, 2004.....5

No. 03-1267

IN THE SUPREME COURT OF THE UNITED STATES

GABE KAIMOWITZ,

Petitioner,

v.

ORLANDO, FL; RICK BERNHARDT, and ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

INTRODUCTION

In September 1981, while this Court was in recess, attorneys for New York City, Petitioner here and two co-counsel appeared before Justice Thurgood Marshall. Petitioner asked him to consider that day's front page tabloid newspaper announcements of postponement of a mayoral primary, as a basis for denying relief to the City. A three-judge court below had ordered the postponement, because New York failed to comply with a statutory requirement.

The City filed an emergency petition to stay the lower court decision, and have the election go forward on schedule. Petitioner argued such a ruling would confuse voters with new headlines and cause many to stay away.

Justice Marshall contacted all other members except the Chief Justice who was unavailable. Those voting unanimously denied the City's petition, *Koch v. Herron*, 453 U.S. 946 (1981). In support of this petition, Petitioner asks this Court to consider several articles, in *The Orlando Sentinel* this month. Full articles cited below may be found at: http://www.orlandosentinel.com/ through its archives. Earlier news reports are contained in the Appendix with the petition. See, e.g., Appendix, pp. 91-a; 96-a, 97-a, 111-a, 112-a, hereafter by page number only.

No exception was taken to the news reports, in the only response filed for some–but not all–of the Respondents, (hence Orlando Brief here) despite a claim to the contrary on the cover. No response has been filed for the Orlando Neighborhood Improvement Corp., though one of two questions presented concerns that enterprise.

That cover is only the tip of the iceberg of misleading information about issues, facts, and applicable law in the Orlando Brief by Orlando's counsel here. See discussion, *infra*. He took over representation for Orlando in the ninth year of this litigation, in November 2002, and responded only sporadically–e.g., he filed no response after Petitioner fleshed out for the district judge the bases for the allegations cited in the Orlando Brief, p. 8 (see relevant Order, p. 5-a).

The Orlando Brief, pp. 5-6, does echo judicial findings that no Respondent knowingly made a false claim to the United States in violation of the False Claims Act. The news reports illustrate why only such a glittering generality could cover the millions lost by U.S. taxpayers. Orlando was never tried seriously to recover them, because funds wasted were issued from the U.S. treasury based on false claims. The false claims were laid out precisely in the complaint. They were provided in each record excerpt on appeal thereafter, 1995-2002. The news reports flesh out one.

"C. Orlando has certified falsely that it is in full compliance with HUD (U.S. Department of Housing and Urban Development) regulations and guidelines, though it has not kept, or refused in 1993 to reveal ...the documentation for grants received from HUD for its rental rehabilitation programs....The City is required to do (so) upon appropriate demand, 24 C.F.R. §12.14(c)(2). See also Sub-part C– Disclosure by Applicants, 24 C.F.R. §12.30, et seq

i. A bare-bones list of sub-recipients of all such multi-family rental rehabilitation (RPP) loans was given to the Qui Tam Plaintiff in June 1993, without RPP amounts. A list of those amounts was obtained by him from Stella Lewis, in her private capacity. She is a member of the Orlando Board of Zoning Adjustment.

ii. Lewis determined that a "slumlord" Philip Cowherd has received $311,735 of the $1,081,569 distributed for RPP purposes between 1985 and 1993. He got assistance for 19 of the 74 rental rehab projects funded in that period of time.

iii. In 1993, Cowherd was reported to own more than 20 multi-family rental facilities in the 99% African-American Holden-Parramore neighborhood.

iv. In 1993, Cowherd served Orlando as the lone white private citizen who appeared for a photo opportunity with other members appointed by the City to a rump board chosen by Orlando to develop Parramore Heritage Renovation Project ("PHRP.").

v. In 1993, Cowherd also served on an advisory committee considering CDBG grants for the PHRP and other projects."

Complaint, *supra*, at p. 6.

"Orlando Mayor Buddy Dyer wants a dozen Parramore landlords to repay $318,617 the city loaned them more than 10 years ago to help renovate their rental property....Already, the city has lost out on $267,597, in similar loans after failing to collect before the five-year statute of limitations lapsed....The city began the program in 1985 and gave out 73 no-interest, 10-year loans through 1993. The money came through the U.S. Department of Housing and Urban Development....Phil Cowherd, who with 11 loans received more than any other property owner, hasn't paid back any of them. He's off the hook for six of them, worth $90,880, because the statute of limitations ran out. Now the city hopes to get the $43,772, owed for the remaining five. Cowherd, who campaigned against Dyer's re-election last month...questioned the timing of the move. He says he, too, was told the city would never enforce payment."

B. Kassab, "Old loans close in on landlords,"
The Orlando Sentinel, Apr. 6, 2004, pp. B-1, B-4.

"Parramore landlords who received renovations loans from Orlando deserve no sympathy now that the city is demanding repayment....In the past, Orlando officials have been lax in enforcing the repayment terms in various programs designed to help small businesses. That explains how the city allowed the statute of limitations to elapse on $267,000 in similar renovation loans....The city's credibility depends on enforcing the terms of its contracts."

Editorial, "A contract is a contract,"
The Orlando Sentinel, Apr. 12, 2004, p. A-13.

Such reports serve to illustrate the harm done (1) in fact and (2) to the appearance of justice, when the U.S. Court of Appeals for the 11th Circuit looked the other way, while Judge Patricia C. Fawsett absolved Respondents of any wrongdoing, 1995-2002. Why did she do so?

> "Shovels hit dirt Monday to kick off construction of Orlando's new $86 million federal courthouse. The 10 a.m. ceremony ended 12 years of planning, gentle arm-twisting and begging by Middle District of Florida Chief Judge Patricia C. Fawsett and other judges and federal employees....The addition comes years after it was first requested to keep pace with Central Florida's population boom and the rise in criminal and civil cases that followed. Congress approved $79 million for the project in 2002 and another $7.2 million in 2003.....This year (the court) will handle 8,000 cases, Fawsett said in her address. Among the speakers were Orlando Mayor Buddy Dyer and City Commissioner Daisy Lynum, who said the complex–including the Florida A&M University College of Law being built next door–would complement ongoing revitalization of the Parramore district."
>
> H. P. Curtis, "Officials launch new courthouse," *The Orlando Sentinel*, Apr. 6, 2004, p. B4.

Not reported were the *ex parte* communications with Defendant Richard Bernhardt, Tom Kohler, etc., for Orlando by Judge Fawsett and other jurists. See pp. 94-a through 112-a. Judges shared a common goal with Defendants, to create appropriate surroundings and structure in a poor black area for the courthouse complex. So Judge Fawsett found no merit in any paper for the plaintiffs, no matter what it included. She did not allow them a hearing.

With several Eleventh Circuit judges also involved in those *ex parte* communications, that appeals court sanctioned a departure from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's supervisory power, S.Ct.R. 10.

ADDITIONAL STATUTE INVOLVED

28 U.S.C. §2101(c) states: "Any other appeal or any writ of certiorari intended to bring any judgment or decree in any civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

I. THIS COURT HAS JURISDICTION.

The Orlando Brief, p. 2, cites four U.S. Supreme Court denials of certiorari, to suggest that Petitioner filed this action in untimely fashion after 90 days. No mention is made of the aforementioned statute, though three denials cite it specifically, the fourth by implication.

Relying on the last sentence, Petitioner sought an extension, "for good cause shown," and received it from Circuit Justice Anthony Kennedy, p. 115-a. Petitioner needed such extension, to make certain that he could make a full presentation, even if his petition were due within 90 days from dismissal of the appeal, rather than from action on a petition for rehearing pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, pp. 1-a/2-a.. See *Missouri v. Jenkins*, 497 U.S. 33, 46-50 (1990). Such extensions are not granted as a matter of course, *Kleem v. Immigration and Naturalization Service*, 479 U.S. 1308, 1309 (1986)(Extension denial by Circuit Justice Antonin Scalia.)

Respondents could have opposed the application for an extension of time but none of them did so. The petition was timely filed within the time allowed by the Circuit Justice. This Court has jurisdiction to consider the merits.

II. THIS PETITION REQUIRES SCRUTINY MANDATED IN *LILJEBERG v. HEALTH SERVICES ACQUISITION CORPORATION.*

The Orlando Brief, p. 13, does cite *Liljeberg v. Health Services Acquisition Corporation*, 846 U.S. 847 (1988), but primarily to show apparently that Judge Fawsett was right in not stepping aside from 1995-2003 on the basis of "unsupported, irrational or highly tenuous speculation," *id.*, at 859-60. The Orlando Brief does not address the undisclosed *ex parte* communications Judge Fawsett and the other jurists had with the Bernhardt, Kohler and other Orlando employees, at invitation-only meetings without notice to Plaintiffs. See, e.g., pp. 95-a, 101-a/104-a. Those surfaced only after she did step aside *sua sponte*, because she claimed she had been informed that an unidentified investment in which she held an undetermined interest would undertake negotiations with the City of Orlando about an undisclosed subject in the near future (p.74-a). She had used the same reason to step aside in a related False Claims Act case three months earlier (p. 69-a).

The aforementioned *ex parte* communications giving rise to this petition are not mentioned at all in the Orlando Brief. Indeed, the only mention of *ex parte* communications is on the same page 13. A lower court case is cited to support the proposition that a judge should not step aside, because of conclusory allegations; further, the plaintiff could not identify the *ex parte* communicants. The Orlando Brief is replete with a dozen other similar citations from various circuits being offered as black letter law binding this Court.

The citations to this Court's decisions also are misleading. Petitioner already has noted four cited in the Orlando Brief, p. 2, without notation that each was a *per curiam* statement in denial of a petition for writ of certiorari.

> It is important to emphasize that the denial of the petition for writ of certiorari is not a ruling on any of the unsettled and important questions of law presented in the petition. See *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978).

Haitian Refugee Center, Inc., v. Baker, 501 U.S. 1122 (1992)(Stevens, J. respecting denial of certiorari).

In the Orlando Brief, p. 1, *Baker* is cited for a desired application of Rule 10, S. Ct. R. to block the petition here. In fact, the only mention of Rule 10 occurs in a comment by one justice who alone should have been cited, *"Haitian Refugee Center, Inc., v. Baker*, 501 U.S. 1122, 1123 (1992)(Thomas J., respecting denial of certiorari)."

Another misleading cite is offered to support a demand for sanctions here. See the Orlando Brief at p. 15. In addition to an applicable court rule, that Brief cites and quotes from what appears to be the Court's decision in *Clark v. Florida*, 475 U.S. 1134 (1986). But the Court only dismissed for want of jurisdiction or, "treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." The opinion is that of only one justice, Chief Justice Warren Burger, at pp. 1134-1138.

The Orlando Brief cites, at p. 12, *Toledo Scale Company v. Computing Scale Company*, 261 U.S. 399, 425 (1923) to show that the U.S. Supreme Court is prevented from taking jurisdiction "by a most salutary rule of law which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing."

With due diligence, should Petitioner have been able to discover Judge Fawsett's hidden agenda to get a new federal courthouse to her liking when she learned by October 3, 1996 that money had become available for that purpose? See Petition for Writ of Certiorari, pp. 19, 89-a. Judge Fawsett a few weeks later granted judgment to all Respondents on the same day the representative of the U.S. Department of Justice was faxing for information to prepare for jury trial a week later. See Petition for Writ of Certiorari, p. 10. Before any fees were awarded against Petitioner, on appeal, and certainly below, should he have been able to find out what Eleventh Circuit representatives knew about ongoing discussions in the spring of 1998 between Judge Fawsett and at least one other judge and Orlando's Bernhardt and Kohler at invitation-only meetings? Orlando withheld that correspondence until March 2003.

What the Orlando Brief fails to do is provide any meaningful response to the question presented here: Is Petitioner entitled to relief, because of "• a systematic derogation of due process of law by a cover up of *ex parte* communications without notice to him, • between and among trial and appellate judges, court personnel and defendant Orlando agents including Bernhardt, (at) private meetings held (during a period of) several years....• about a new federal courthouse discussed in the context of municipal planning goals for the surrounding historically black Southwest Quarter of the city?" See Petition, p. i.

The *ex parte* communications at issue here dwarf by comparison those which required a disqualification as soon as possible after they were discovered, in *Liljeberg*, *supra*. Under these extraordinary circumstances, this Court should order judgments entered below–to date–to be vacated, to assure that justice will satisfy the appearance of justice, *Liljeberg*, 486 U.S. *supra* at 863-864.

III. SUITABLE COUNSEL CAN BE FOUND TO ARGUE THESE IMPORTANT ISSUES.

In light of the Orlando Brief, submitted by an attorney who claims to be a member of the Bar of this Court, Petitioner fears that his petition could be denied. He is disfavored by appearing here *pro se* Although Petitioner was heartened by this Court's granting of a motion to an attorney to proceed *pro se*, or *pro hac vice*, albeit as a respondent, *Elk Grove Unified Sch. Dist. v. Newdow*, #02-1642 (Motion granted Dec. 1, 2003), he already actively seeks representation by an experienced member of the Bar of this Court to address the questions presented concerning the effect on judgments of years of revelations of *ex parte* communications between judges and Orlando representatives first disclosed in 2003, if this petition for a writ is granted.

Petitioner obviously cannot speak for Respondents' legal representation, but the current open controversy about the waste of federal rental housing rehab funds, *supra*, at p. 4, first exposed in his complaint, should prompt fresh review of these proceedings by the City's legal arm. To that end, Petitioner is serving copies of this Brief upon the Orlando City Attorney who took office last year for a new mayor.

CONCLUSION

For the reasons set forth in the petition and this supplementary and responsive brief, Petitioner seeks review of the questions presented concerning Orlando Respondents, and separately, Orlando Neighborhood Improvement Corp.

Respectfully submitted,

H. GABRIEL KAIMOWITZ, Esq.
4411 S.W. 34th St., #1305
Gainesville, FL 32608
(352) 375-2670
Attorney and Petitioner *Pro Se*